October 27, 1999

D.T.E. 99-69

Petition of Commonwealth Electric Company for approval of an Amended and Restated Power Sale Agreement with Lowell Cogeneration Company Limited Partnership.

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FOR: COMMONWEALTH ELECTRIC COMPANY

Petitioner

I. INTRODUCTION

On July 22, 1999, Commonwealth Electric Company ("Commonwealth" or "Company"), pursuant to an Act Relative to Restructuring the Electric Utility Industry, G.L. c. 164, §§ 1A, 1G, 76, 94, and 94A ("Act") and 220 C.M.R. §§ 8.00 et seq., petitioned the Department of Telecommunications and Energy ("Department") for approval of an Amended and Restated Power Sale Agreement ("Amended Agreement") that the Company executed with Lowell Cogeneration Company Limited Partnership ("Lowell Cogen"). Specifically, Commonwealth requests that the Department approve (1) the termination of all obligations that the Company has with respect to purchasing electricity from Lowell Cogen, and (2) the inclusion of the buy-out amount as an actual and fully mitigated transition cost in the fixed component of the Company's transition charge.

Concurrently, the Company filed a Motion for Protective Treatment and requests that the economic analyses and pricing information contained in Attachments 1 and 3 to Appendix 4 of its petition be given protective treatment. On August 9, 1999, the

Department issued a Notice of Filing and Request for Comments. The Attorney General submitted comments.

II. MOTION FOR PROTECTIVE TREATMENT

A. Introduction

On July 22, 1999, Commonwealth filed, pursuant to G.L. c. 25, § 5D, a Motion for Protective Treatment ("Motion") of Attachments 1 and 3 of Appendix 4 of the Company's petition. Commonwealth seeks to protect from public disclosure economic analyses embodying Commonwealth's method of evaluating restructuring or buy-out proposals, including projected market rates (Motion at 4). The Company argues that disclosure of this information could be detrimental to Commonwealth and its customers because disclosure would undermine the Company's ability to maximize mitigation efforts (id.). Commonwealth's negotiating position in regard to other power purchase agreements ("PPA") would be substantially harmed, according to the Company, if current market price assumptions and other sensitive material included in these attachments were disclosed (id.).

The Company states that, upon completion of the buy-out or restructuring of all of the Company's PPAs, the protection requested here will terminate (id., citing Western Massachusetts Electric Company, D.T.E. 99-56, at 5 (1999); Boston Edison Company, D.T.E. 99-16, at 4 (1999)).

B. Standard of Review

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> the [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by

G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, [or] confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U.

96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

C. Analysis and Findings

For the reasons cited by the Company in its Motion, the Department finds that the information contained in the economic analyses in Attachments 1 and 3 of Appendix 4 is competitively sensitive and confidential. Disclosure of the information for which the Company seeks protection could undermine its efforts to maximize mitigation in negotiating buy-outs of other PPAs. Accordingly, the Department finds that the Company has provided sufficient reasons to protect the information in accordance with G.L. c. 25, § 5D, and hereby grants the Company's Motion for Protective Treatment. Thus, Attachments 1 and 3 of Appendix 4 of the Company's Petition for Approval of Amended and Restated Power Sale Agreement By and Between Commonwealth Electric Company and Lowell Cogeneration Company Limited Partnership will be excepted from public disclosure under G.L. c. 25, § 5D. Upon the completion of all Commonwealth's PPA buy-outs and re-negotiation under the Act, the Company should so inform the Department; at that time the § 5D protection accorded here will terminate without further action of the Department.

III. LOWELL COGENERATION CONTRACT AMENDMENT

A. Description

1. Current Agreement

Commonwealth and Lowell Cogen entered into a PPA on September 29, 1986, and supplemented it on March 30, 1987 (Exh. ComElec-1, at 2). Pursuant to that agreement, Commonwealth purchased the entire electrical output of the 28 megawatt Lowell Cogen facility (id.). Commonwealth and Lowell Cogen restructured the PPA on September 16, 1994, pursuant to which Commonwealth (1) makes specified fixed and escalating monthly payments to Lowell Cogen; (2) need not buy Lowell Cogen's output until January 1, 2001; (3) can call the unit into service before then if it is needed; and (4) must buy Lowell Cogen's entire output, as specified in the original PPA, from January 1, 2001, until January 1, 2011 (id. at 2-3). The price for that output is scheduled to rise each year from 14.2 cents per kilowatthour ("KWH") in 2001 to 17.7 cents per KWH in 2010 (id., App. 4). Commonwealth's fixed and escalating monthly payments to Lowell Cogen, net of the market value of any electricity delivered, are currently included in the variable component of its transition charge as above-market PPA costs (Exh. ComElec-1, at 3-4).

2. Proposed Amended Agreement

The Amended Agreement would end Commonwealth's obligation to buy from Lowell Cogen (Exh. ComElec-1, at 4). In return, Commonwealth would pay Lowell Cogen $1,061,790 per month for 54 months, after which the contractual relationship between Commonwealth and Lowell Cogen would end (id. at 5; Exh. DTE-1-4). Under the Amended Agreement, Commonwealth continues to have the right to call the Lowell Cogen unit back into service if needed, as a dispatchable unit, on a temporary basis rather than on the continuing basis specified under the restructured agreement (Exh. ComElec-1, at 2, 5). Under the Amended Agreement, during any call-back period, Commonwealth would pay Lowell Cogen for its documented variable cost of energy delivered plus 25 percent of the $1,061,790 base monthly payment, in addition to the base payment (id. at 5; Exh. DTE-1-2).

Commonwealth states that the Amended Agreement will reduce total transition costs for Commonwealth's customers by $26 million in present value terms, by eliminating the variable transition costs associated with the Lowell Cogen contract (id., App. 4, at 3-4). This savings represents approximately 30 percent of Commonwealth's obligation under the restructured contract and approximately 39 percent of the transition cost portion of that obligation (id.). Commonwealth contends that the Amended Agreement fulfills the Company's responsibility under G.L. c. 164, § 1G to take all reasonable steps to mitigate, to the maximum extent possible, the total amount of its transition costs relating to Lowell Cogen (Exh. ComElec-1, at 6-7).

Commonwealth proposes to use part of the money from the sale of the Canal Generating Station, held by Energy Investment Services ("EIS")[(1)], to make the fixed payments to

Lowell Cogen (id. at 6 n.2). Commonwealth also proposes that these fixed payments be included in the fixed portion of its transition costs charge (id. at 7).

B. Attorney General

The Attorney General states that the Amended Agreement appears to help mitigate transition costs and produce savings for ratepayers, but he takes no position concerning whether the Department should approve the Amended Agreement (Attorney General Comments at 1). The Attorney General requests that the Department defer ratemaking treatment of the Amended Agreement to the Company's next annual reconciliation filing (id.). The Attorney General states that, in that proceeding, he would seek additional information regarding whether using EIS funds to make payments to Lowell Cogen is appropriate and whether the Company is improperly seeking carrying costs on customer funds, that is, the unamortized amount of the buy-out costs (id. at 1-2).

C. Standard of Review

In determining whether to approve a Settlement Agreement, the Department must address its reasonableness.[(2)] In assessing the reasonableness of the Settlement Agreement, the Department must review all available information to ensure that the agreement is consistent with the public interest. Commonwealth Electric Company, D.P.U. 91-200, at 5 (1993); Boston Edison Company, D.P.U. 92-183 (1992) (Department approval of a termination agreement of a purchase power contract with Down Easter Peat, L.P.). The Department also must review the Settlement Agreement in the context of the precedent regarding buy-outs of purchase power contracts. D.P.U. 91-200, at 6.

The Department's regulations do not prohibit a company from negotiating a release from the obligations it has incurred, but such releases are subject to the Department's review. Altresco-Lynn, Inc. and Altresco-Pittsfield L.P., D.P.U. 91-142; and Cambridge Electric Light Company and Commonwealth Electric Company, D.P.U. 91-153, at 15 (1991).[(3)] The Department has also found that a buy-out of a Boston Edison contract with Altresco-Lynn was in the public interest. Boston Edison Company, D.P.U. 92-130-D (1996). In Electric Industry Restructuring, D.P.U. 95-30, at 32-35 (1995), the Department recognized the amount by which the cost of existing contractual commitments for purchased power exceeds the competitive market price for generation as a cognizable component of stranded costs. That Order further stated that a reasonable opportunity to recover stranded costs would be in the public interest. The Act also allows for recovery of costs for existing contractual obligations for purchased power through the transition charge. G.L. c. 164, § 1G(b)(1)(iv). In Commonwealth Electric Company, D.T.E. 97-111, at 90 (1998), the Department found that Commonwealth Electric Company's restructuring plan, which provided for the buy-out of above-market purchase power obligations, was consistent with or substantially complied with the Act. Id.

G.L. c. 164, § 1 et seq., requires electric companies to seek to mitigate transition costs, including as one mitigation method the renegotiation of above-market power purchase contracts. G.L. c. 164, § 1G(d)(1)-(2). The Restructuring Act further provides that if a

negotiated contract buy-out is likely to achieve savings to ratepayers and is otherwise in the public interest, the Department is authorized to approve the recovery of the costs associated with the contract buy-out. G.L. c. 164, § 1G(b)(1)(iv).

D. Analysis and Findings

As a result of the Lowell Cogen contract buy-out, Commonwealth's ratepayers will save approximately $26 million, or 39 percent of the Lowell PPA's contribution to Commonwealth's transition costs (Exh. WMECo-1, at 2, Exh. 5). A reduction of 39 percent is substantial; the Department finds that the buy-out will help mitigate Commonwealth's transition costs and produce cost savings for its ratepayers. This contract buy-out is the type of action specifically encouraged by the Legislature in G.L. c. 164, § 1G(d). That is, Commonwealth has taken all reasonable steps to mitigate, to the maximum extent possible, the total amount of transition costs relating to Lowell. Noting that the contract buy-out is consistent with applicable law and will achieve substantial savings to ratepayers, reducing the Company's transition charge, and noting no adverse impacts of the buy-out, the Department finds that the contract buy-out is in the public interest. Accordingly, the Department approves the buy-out of the Lowell Cogen contract and authorizes Commonwealth to recover the payments and associated transaction costs in its transition charge. See Boston Edison Company, D.T.E. 98-119 (1999) (above-market buy-outs of existing power purchase agreements may be included in the transition charge).

Commonwealth proposes to use funds invested with EIS to make the payments and to reflect those payments in the Fixed Component of its transition charge. In Commonwealth Electric Company, D.T.E. 98-78/83-A, which approved the creation of EIS, the Department observed that Commonwealth "agreed to pursue the buyout of above market PPAs" as an "investment alternative" for EIS, which would ameliorate the adverse financial impact on ratepayers of an otherwise low rate of return on EIS investments. Id. at 12-13. The Department specifically ordered Commonwealth "to explore all other uses of the proceeds that would provide ratepayers with a [rate of return] more in line with [that] included in the Companies' Restructuring Plan." Id. at 13. The Department finds that Commonwealth's use of EIS funds to make the contract buyout payments appears to be exactly what the Department ordered Commonwealth to do, and the Department therefore approves this use of EIS funds.

The Company seeks recovery of these amounts in the fixed component of the transition charge. This is inconsistent with the restructuring plan approved by the Department pursuant to G.L. c. 164, § 1(A)(a) in its Order in Commonwealth Electric Company, D.T.E. 97-111 (February 27, 1998); see also, Exh. CEC-1, at 20, D.T.E. 97-111. In D.T.E. 97-111, at 63, 90, the Department approved the Company's plan to recover above-market payments to power suppliers and economic buy-out payments of PPAs in the variable component of transition cost recovery. Therefore, recovery of the termination payment amount and associated transaction costs of the PPA that is the subject of this Order shall be included in the variable component of the transition charge. Should the

Company wish to make any changes to this portion of its restructuring plan, it should so propose in its next reconciliation filing.

IV. ORDER

Accordingly, after due notice, opportunity for public comment, and consideration, it is hereby

ORDERED: That the Petition for approval of a Amended Agreement between Commonwealth Electric Company and Lowell Cogeneration Company Limited Partnership is approved; and it is

FURTHER ORDERED: That Commonwealth Electric Company may include the termination payment amount of the Amended Agreement in the variable portion of its transition charge, pending any necessary revision of this ratemaking treatment pursuant to its next reconciliation account proceeding.

By Order of the Department,

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Janet Gail Besser, Chair

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James Connelly, Commissioner

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. Energy Investment Services, Inc., is a special purpose affiliate established by Commonwealth to hold and manage the proceeds from the sale of the Canal 1 and 2 generating facilities. Cambridge Electric Light Company/Commonwealth Electric Company/ Canal Electric Company, D.T.E. 98-78/83, at 13 (December 23, 1998).

2. The Department has treated termination agreements as settlements. See e.g., Plymouth Rock Energy Associates, L.P., D.T.E. 92-122-B (1999).

3. In addressing a petition for an exception from 220 C.M.R. §§ 8.00 et seq., involving the negotiation and finalization of a power sales agreement, the Department stated that a company might be under an obligation to pursue a settlement if it was the best option for ratepayers. D.P.U. 91-153, at 15.